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COMMERCE ASSET VENTURES SDN BHD

v.

DATUK DR KAMAL MAT SALLEH & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID AHMAD J
[SUIT NO: D8-22-960-2003]
21 FEBRUARY 2005

C

CIVIL PROCEDURE: *Judgments and orders - Rescission - Order for specific performance - Plaintiff applied for and was granted order for specific performance - Whether could subsequently rescind same*

The sole issue that arose in this action was whether the plaintiff, having been granted an order for specific performance, could subsequently
D rescind the same. The facts were that, on 29 January 2004, the court herein had granted the plaintiff's application for an order for specific performance of a certain Put Option Agreement ('the order'). The defendants however were unable to comply with the order within the time specified, whereupon the plaintiff applied to rescind the order. The
E defendants resisted and argued that the plaintiff was estopped from rescinding the order. Additionally, it was argued that the order ought to stand, as the defendants could still make the necessary funding arrangements to comply with the order.

Held (allowing application to rescind):

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(1) Rescission ought to be allowed as there is no way the defendants could comply with the order (para 14).

(2) Bearing in mind the principles in *Sekemas v. Lian Seng Co* and *Loo Choo Teng v. Cheok Swee Lee*, it is clear that the court has the
G jurisdiction to hear the application. Further, on the authority of *Johnson v. Agnew*, the plaintiff is not estopped from making this application merely because they had earlier asked for the order and obtained it. The plaintiff could apply to rescind the order if there were circumstances to show that the defendants were in no position
H to fulfill their obligations under the order. (paras 15-17)

(3) The defendants had made numerous suggestions of resolving the matter by paying what is due under the Put Option Agreement. The defendants had also sought to make funding arrangements, but could
I not make good the effort. Be that as it may, with the pending bankruptcy proceedings against the first defendant, it is highly unlikely that any personal guarantee given by him would be

acceptable to any financial institution for the funding of the Put Option Agreement. That being so, the order of 29 January 2004 would not serve any purpose and there is no reason for it to continue. (paras 20 & 21)

Case(s) referred to:
Loo Choo Teng v. Cheok Swee Lee [2000] 2 CLJ 389 CA ***(refd)***
Johnson v. Agnew [1979] 1 All ER 883 ***(refd)***
Sekemas v. Lian Seng Co [1989] 2 CLJ 142 SC ***(refd)***

For the plaintiff - Tharminder Singh; M/s Logan Sabapathy & Co
For the defendant - AG Dicom; M/s AG Dicom & Co

Reported by Rose Aziz

JUDGMENT

Abdul Wahab Said Ahmad J:

[1] The plaintiff, Commerce Asset Ventures Sdn Bhd applied in summons-in-chambers encl. 20 to rescind and terminate the put option agreement dated 22 November 1999 that was ordered by the court on 29 January 2004 to be specifically performed. The plaintiff also prayed for an order that an inquiry be made before the judge in chambers as to what damages the plaintiff has sustained because of the defendant's repudiation of the put option agreement.

[2] The grounds for the plaintiff's application are firstly, the defendants had refused to comply with the order dated 29 January 2004, even though the order was served on the defendant's solicitors on 29 April 2004. Secondly, the defendants had sought to extend the original seven day period provided in the order dated 29 January 2004 but aborted it. The reason given was that the defendants were unable to finalize their financial arrangements. Thirdly, bankruptcy proceedings had been commenced against the first defendant *vide* Kuala Lumpur High Court Bankruptcy No. D4-29-3169-2003. Fourthly, the defendant's ability to complete the put option agreement and carry out the terms of the order dated 29 January 2004 is doubtful.

[3] In his affidavit-in-reply the first defendant denied that a receiving and adjudication order was ever made against him. He also claimed that he is still trying to comply with the order of the court dated 29 January 2004 in that he is negotiating with United Overseas Bank (UOB) and that the plaintiff is aware of the negotiations. He claimed that the plaintiff is therefore estopped from terminating the order. By making this application, the first defendant said that the plaintiff had abandoned its claim for specific performance.

[4] In its submissions, the plaintiff reproduced the entire chronology of events that led to the order of 29 January 2004 and the subsequent attempt to extend the time for the compliance of the order. The events were unfolded to show the defendants ability to comply with the order. The plaintiff said that the court has the power to rescind or terminate an order of specific performance, which was given earlier. The plaintiff's learned counsel referred to *Sekemas v. Lian Seng Co.* [1989] 2 CLJ 142 SC at p. 157 where Lee Hun Hoe Borneo held that: "in *Johnson v. Agnew* the House of Lords varied the order of the Court of Appeal holding that if a vendor obtained the order of specific performance and it became impossible to enforce it, he then had the right to ask the court to discharge the order and terminate the contract. On such an application he could be awarded damages at common law for breach of contract since the contract was not rescinded *ab initio* but remained in existence until it was terminated by the court."

[5] The defendants raised the issue that the court had no jurisdiction to deal with this matter since it is *functus officio*, by virtue of the order of 29 January 2004. Further, the defendants said that the plaintiff, having first obtained the specific performance order, is estopped from pursuing encl. 20.

[6] I allowed the plaintiff's application. From the events that had unfolded, it is clear that there is no way in which the defendants could comply with the said order. For ease of understanding, I reproduce briefly, the facts of the case.

[7] The defendants are controlling shareholders of Sesama Medical College Management Sdn Bhd, with a shareholding of 86.49%. A written agreement was entered into between the plaintiff and the defendant on 22 November 1999. On the same day, the plaintiff completed the acquisition of 2,610,000 ordinary shares of RM1 each, fully paid of the above company from the second defendant for the sum of RM21,000,060.

[8] The parties entered into a further written agreement on the same day where it was recognized and agreed that the main objective of the company was to obtain a public listing either on the main or second board of the Kuala Lumpur Stock Exchange within a specified period. A further written agreement was drawn up and it was stipulated that the above objective was to be achieved by 31 December 2002, failing which the plaintiff is entitled to exercise its rights under the put option agreement.

[9] Pursuant to the put option agreement of 22 November 1999 mentioned earlier, the defendants, pursuant to sections 2.01 and 3.01(b)(iii), jointly and severally, irrevocably agreed with the plaintiff, by way of option, to purchase the subject shares at an agreed put option price from the plaintiff in the event of failure on the part of the company to make the relevant application to the authorities by 31 December 2002.

[10] Among the salient terms of the put option agreement are:

(a) The "put option" price for the purchase of the subject shares was agreed at initial Cash Outlay together with an internal rate of return agreed at 15% per annum calculated on the Initial Cash Outlay from the date of completion of the sale and purchase agreement (22 November 1999) to the date of payment of the put option price.

(b) The said option shall be exercisable by written notice issued by the plaintiff to the defendants, where they will jointly and severally, at the date specified in the notice, pay the plaintiff the put option price by way of bankers draft, after which the plaintiff shall deliver to both or either of them (as the case maybe) duly executed transfers of the subject share in favour of both or either of the defendants, together with the share certificates relevant to the subject shares.

[11] The plaintiff contends that the defendants have become obliged to the plaintiff under the put option agreement because of the following circumstances:

(a) The company has failed to submit an application to the relevant authorities by 31 December 2002 towards receiving the principal objective (of being listed in the main or second board of the KLSE)

(b) The defendants had indicated in a board meeting of the company held on or about 28 February 2003, that the company shall not in any event proceed with the principle objective, thus being in breach of the supplemental agreement.

[12] Despite receiving a notice dated 24 March 2003 requiring them to come to the plaintiff's office to complete the purchase of the subject shares, pursuant to the put option agreement, the defendants failed to turn up.

[13] The defendants merely raised the issue that the documents produced in the plaintiff's 1st affidavit were not receivable in evidence since the unstamped copies were produced. However the plaintiff produced the stamped copies and that was the end of the matter.

[14] After hearing both sides, I granted the plaintiff's application that the put option agreement be specifically performed. That was the order of 29 January 2004 that the plaintiff has sought to rescind. I allowed the rescission because I agree with the plaintiff that there is no way in which the defendants could comply with the order. The defendants did not comply with the specific performance order within the time period specified. They filed an application dated 11 June 2004 (encl. 12) to vary the specific performance order to allow for compliance within a thirty day period from the service of the specific performance order on them. The application was aborted. It was withdrawn on 5 July 2004 and the court had accordingly struck it off. The application was not heard because it was postponed a number of times upon the request of the defendants, to enable them to make arrangements with a third party, in order that its obligations with the plaintiff could be fulfilled.

[15] On the issue raised by the defendants, whether the court has jurisdiction to hear this application, I am satisfied besides the dicta of Lee Hun Hoe Borneo in *Sekemas v. Lian Seng Co.,* Gopal Sri Ram had made it clear in *Loo Choo Teng v. Cheok Swee Lee* [2000] 2 CLJ 389 CA that: "There is also precedent for decreeing specific performance and then leaving it to the defendant to later apply to have the decree vacated on the ground of impossibility of performance."

[16] On the argument that the plaintiff is estopped from making this application because it had obtained an order for specific performance, I need only refer to Lord Wilberforce's words in *Johnson v. Agnew* [1979] 1 All ER 883:

> But it is no more difficult to agree that a party, who has chosen to seek specific performance may quite well thereafter, if specific performance fails to be realized, say, "Very well, then, the contract should be regarded as terminated." It is quite consistent with a decision to provisionally keep alive, to say, "Well, this is no use -let us now end the contract's life. A vendor who seeks (and get) specific performance is merely electing for a course which may or may not lead to implementation of the contract; what he elects for is not eternal and unconditional affirmation, but a continuance of the contract under the control of the court which control involves the power, in certain events, to terminate it. If he makes an election at all, he does so when he decides not to proceed under the order for specific performance, but asks the court to terminate the contract.

[17] The above words need no elaboration. It is crystal clear that the plaintiff is not estopped from making this application merely because they had earlier asked for the order of specific performance and obtained it. If there are circumstances to show that the defendants are in no position to fulfill their obligations under the order, the plaintiff may apply to rescind it.

[18] I exercised my discretion to rescind the order having been satisfied that the defendants are unable to meet their obligations. The defendants have attempted to show that there are further funding arrangements that are conditional upon the following:

(i) the ability of the 1st defendant to give a personal guarantee; and

(ii) the waivers sought from the other minority shareholders on a mandatory general offer.

[19] I agree with the plaintiff that the defendants' ability to meet those conditions is suspect because:

(i) there is pending bankruptcy proceedings against the 1st defendant; and

(ii) one of the minority shareholders had refused to agree to such a waiver and it is possible that the other minority shareholders would also not agree.

[20] I have observed that the defendant had since the commencement of this action made numerous suggestions of resolving the matter by paying what is due under the put option agreement. The defendants had also said to the very last minute that they are making funding arrangements. However, the defendants have not been able to make good any of the purported funding arrangements. As it is, with the pending bankruptcy proceedings against the 1st defendant it is highly unlikely that any personal guarantee given by him would be acceptable to any financial institution for the funding of the put option agreement.

[21] Under the above circumstances, I do not feel that the order of 29 January 2004 would serve its purpose. There is simply no reason for it to continue. I am convinced the defendants would not be able to perform their obligations under the order and it would be proper that the specific performance be dissolved. I therefore granted an order in terms of the plaintiff's application in encl. 20.